

**REMARKS**

**I. Status of the Claims**

Claims 1-4, 6-15, 20-23, 25, 26, 28 and 41-50 are pending in this application. No amendments to the claims have been made herein. Applicants respectfully request examination of this application and timely allowance of the pending claims. Applicants would like to thank the Examiner for withdrawing the rejections under 35 U.S.C. § 112, first paragraph.

**II. Rejections Under 35 U.S.C. § 103**

The Examiner has rejected under 35 U.S.C. § 103(a) (1) claims 1-4, 6-7, 12-15, 20-23, 25-26, 28, and 41-50 as being unpatentable over U.S. Patent No. 5,534,317 to Herman et al. ("Herman") in view of EP 0707040 ("the '040 reference"); and (2) claims 8-11 as being unpatentable over Herman in view of the '040 reference, as applied to claims 1-4, 6-7, 12-15, 20-23, 25-26, 28, and 41-50 above, and further in view of U.S. Patent No. 5,102,955 to Calabro et al. ("Calabro") for the reasons disclosed on pages 3-5 of the Office Action. Applicant traverses this rejection.

Applicant respectfully submits that the Examiner has failed to meet his initial burden of proof for setting forth a prima facie case of obviousness. The Examiner has not made the requisite showing, as is required by M.P.E.P. § 2142, (1) that there is some suggestion or motivation to modify the references or to combine the reference teachings; and (2) that there is a reasonable expectation of success.

The Examiner has not shown a proper motivation to combine Herman with the teachings the '040 reference. The Federal Circuit has held that "[t]he factual inquiry whether to combine references must be thorough and searching. It must be based on

objective evidence in the record.” *In re Lee*, 277 F.3d 1338, 1343 (Fed. Cir. 2002). The Court further held that “[t]he examiner’s conclusory statements . . . do not adequately address the issue of motivation to combine. This factual question is material to patentability, and could not be resolved on subjective belief and unknown authority.” *Id.* at 1343-44.

The Examiner states only that “it would have been obvious to one of ordinary skill in the art at the time of applicant’s invention was made to have provided the polyethylene composition [of the ‘040 reference] in the polyethylene composition of Herman in order to provide good flow behavior, improved resistance toward tension cracks combined with good rigidity as taught or suggested by the ‘040 reference.” Office Action at page 5.

The Examiner, however, has not explained why one skilled in the art would choose the ‘040 reference from the myriad of art available regarding polyethylene compositions. Indeed, a cursory search on the Patent Office website indicates that there are more than 240,000 patents that disclose “polyethylene” just in the time period from 1976 to the filing date of the instant application. Only in the instant specification would one find the requisite motivation to combine the references in such a manner as to arrive at the presently claimed invention. This is nothing more than impermissible hindsight reconstruction using Applicants’ disclosure. The Federal Circuit has made clear that

To draw on hindsight knowledge of the patented invention, when the prior art does not contain or suggest that knowledge, is to use the invention as a template for its own reconstruction - an illogical and inappropriate process by which to determine patentability . . . the invention must be viewed not after the blueprint has been drawn by the inventor, but as it

would have been perceived in the state of the art that existed at the time the invention was made.

*Sensonics Inc. v. Aerosonic Corp.*, 38 U.S.P.Q.2d 151, 1554 (Fed. Cir. 1996).

Additionally, there would be no reasonable expectation of success to combine the references as suggested by the Examiner. The Examiner points to examples 3-6 of the '040 reference as examples of polyethylene compositions having a density ranging from 0.945 to 0.955 g/cm<sup>3</sup> and a melt flow index about 0.1 to 0.4., as that of the claimed polyethylene composition. However, the first HDPE of these examples, "component A," does not fall within the melt index range of the first HDPE of Herman nor does it meet the melt index limitations of the independent claims, but instead ranges from 0.4 to 1.0 g/10min. Moreover, the melt index of the second HDPE of these examples, "component B," is not even disclosed in the '040 reference. Finally, the claimed stress crack resistance, 24 hours, is not taught by the '040 reference. Thus, one skilled in that art would have no reasonable expectation of successfully achieving the density and melt index of the polyethylene composition of the '040 reference from the melt blends taught by Herman, being that the constituent polyethylenes of the two references are either different or not known to be the same.

In effect, the Examiner has picked one melt blended polyethylene composition with certain defined constituent properties and another melt blended polyethylene composition made of at least one different constituent and another constituent that is undefined with respect to that property. The stress crack resistance of the second melt blended polythethylene composition is also not disclosed, further obfuscating an expectation of success. Clearly, one skilled in the art would have no reason to believe that combining the two would result in the claimed polyethylene composition.

Accordingly, for at least these reasons, Applicant respectfully submits that the Examiner has not made an adequate prima facie case for obviousness and, therefore, all the claims are patentable over the cited prior art and, therefore, in condition for allowance.

**IV. Conclusion**

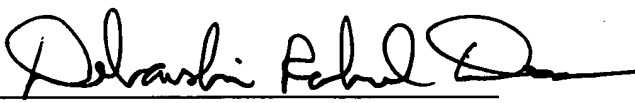
In view of the foregoing amendments and remarks, Applicant respectfully requests reconsideration and reexamination of this application and the timely allowance of the pending claims.

Please grant any extensions of time required to enter this response and charge any additional required fees to our deposit account 06-0916.

Respectfully submitted,

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